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Supreme Court of the United States,

OCTOBER TERM, 1903.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 64.

THE ANGLO-AMERICAN PROVISION COMPANY,
Plaintiff in Error,

against

THE DAVIS PROVISION COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Defendant.

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THE DAVIS PROVISION COMPANY,
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October Term, 1903.
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Brief for Defendant-in-Error.

Writ of error to review a judgment of the Court of Appeals of the State of New York.

The action was brought by the plaintiff-in-error against the defendant-in-error in the Supreme Court of New York upon a judgment obtained by it in Illinois against defendant for $5,049.98.

Both parties are corporations organized under the laws of Illinois, and, as regards the State of New York, both foreign corporations.

The defendant demurred to the jurisdiction of the state court. The demurrer was sustained and final judgment rendered in favor of defendant, which was affirmed by the Appellate Division and again by the Court of Appeals.

The ground upon which judgment has been rendered for defendant by the state courts is that the statute law of New York forbids an action in its courts by one foreign corporation against another foreign corporation upon a cause of action arising outside the State, and because the alleged cause of action on the Illinois judgment arose in Illinois and not in New York.

The statutes in question are now embodied in the Code of Civil Procedure, and are as follows:

Sec. 1779. **When Foreign Corporation May Sue.** An action may be maintained by a foreign corporation in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the State, country or government by or under which the corporation is created; or of an act done at such a meeting which is not in conflict with the same laws or the laws of the State.

Sec. 1780. **When Foreign Corporation May be Sued.** An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation or by a non-resident in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State or a chattel which is replevied within the State.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the State.

Plaintiff denied the validity of these statutes on the ground that so far as they prevented it from maintaining an action on the Illinois judgment they were repugnant to article 4, section 1 of the Constitution, in that full faith and credit was not given to the Illinois judgment.

The Federal question is whether or not the sections of the New York Code above quoted, or either of them, is repugnant to the "full faith and credit" clause of the Constitution.

Or, to put the question in a more practical form: Does that clause of the Constitution compel a State to confer power upon its courts to hear and determine controversies arising outside its limits and between corporations not subject to its laws?

FIRST.

The clause of the Constitution in question relates only to the effect of the judgment as evidence.

The claim of the plaintiff is that section 1780 of the Code, so far as it applies to an action in one State upon a judgment rendered in another, conflicts with article IV., section 1 of the Constitution, which is:

> "Full faith and credit shall be given in each state "to the public acts, records and judicial proceed- "ings of every other state. And the congress may, "by general laws, prescribe the manner in which "such acts, records and proceedings shall be "proved and the effect thereof."

Congress has enacted that such records and judicial proceedings, when authenticated in a particular manner, shall have "such faith and credit given to them in every "court within the United States as they have by law "and usage in the courts of the state from which they "are taken" (R. S., sec. 905).

The settled construction given to these fundamental laws is that they establish a rule of evidence and not of jurisdiction.

Wisconsin *vs.* Pelican Ins. Co., 127 U. S., 265, 291.

Huntington *vs.* Attrill, 146 U. S., 657, 685.

Wisconsin vs. *Pelican Ins. Co.* was an action brought in this Court by the State to enforce a judgment which it had recovered in its own court against the insurance company for penalties for doing business in the State without a license. The defense rested on the rule that "the courts of no country execute the "penal laws of another."

GRAY, *J.*, says (p. 291):

"The application of the rule to the courts of the "several States and of the United States is not af- "fected by the provisions of the Constitution and "of the act of Congress by which the judgments of "the courts of any State are to have such faith "and credit given to them in every court within "the United States as they have by law or usage "in the State in which they are rendered. (Constitution, Art. 4, Sec. 1; Act of May 26, 1790; C. 11; Rev. Stat., § 905).

"Those provisions establish a rule of evidence "rather than of jurisdiction. While they make the "record of a judgment rendered after due notice in "one State, conclusive evidence in the courts of an- "other State, or of the United States, of the mat- "ter adjudged, they do not affect the jurisdiction

" either of the court in which the judgment is " rendered or of the court in which it is offered in " evidence. Judgments recovered in one State of " the Union, when proved in the courts of another " government, whether State or National, within " the United States, differ from judgments re- " covered in a foreign country in no other respect " than in not being re-examinable on their merits " nor impeachable for fraud in obtaining them, if " rendered by a court having jurisdiction of the " cause and of the parties (*Hanley* vs. *Donoghue*, " 116 U. S., 1, 4).

" In the words of Mr. Justice Story, cited and " approved by Mr. Justice Bradley, speaking for " this court, 'The Constitution did not mean to " ' confer any new power upon the States, but " ' simply to regulate the effect of their acknowl- " ' edged jurisdiction over persons and things " ' within their territory. It did not make the " ' judgments of other States domestic judgments " ' to all intents and purposes, but only gave a " ' general validity, faith and credit to them as " ' evidence.' No execution can issue upon such " judgment without a new suit in the tribunals " of other States. And they enjoy not the right " of priority or lien which they have in the State " where they are pronounced, but that only which " the *lex fori* gives to them by its own laws in their " character of foreign judgments " (*Story's Conflict* " *of Laws*, §609; *Thompson* vs. *Whitman*, 18 *Wall*, " 457, 462, 463).

" A judgment recovered in one State, as was " said by Mr. Justice Wayne, delivering an earlier " judgment of this court, ' does not carry with it " ' into another State the efficacy of a judgment " ' upon property or persons to be enforced by exe- " ' cution. To give it the force of a judgment in " ' another State it must be made a judgment

"'there; and can only be executed in the latter
"'as its laws may permit' (*McElmoyle* vs. *Cohen*,
"13 Pet., 312, 325)."

This case overruled certain decisions of different State courts which had considered themselves bound by the Constitution and act of congress to entertain an action on a judgment of another State simply because it was a judgment, and established the proposition that the courts of one State may decline to enforce a judgment rendered in another State, and are justified in so doing when the cause of action originally sued on is of such nature that if the action were on it instead of on the foreign judgment jurisdiction would be declined.

The case of *Huntington* vs. *Attrill* (146 U. S., 657) presented a similar question in a different form. Huntington had procured judgment in New York against the defendant for making a false report as director of a corporation. He then brought a creditor's suit in Maryland, alleging the New York judgment and also the original cause of action. The Maryland court declined jurisdiction on the ground that the action in New York was to recover a penalty for violation of a local law. The decision of the Maryland court was reversed as not giving full faith and credit to the New York judgment, because, in the opinion of this Court, the statute upon which that judgment rested was not penal in the international sense, but conferred upon the creditor of the corporation a civil right which might be enforced anywhere.

The result of these two decisions is that the courts of one State are not *bound* to entertain an action upon a judgment rendered by a court of another merely because such judgment exists and is produced. It must also be made to appear by appropriate pleading that the original cause of action was one which the plaintiff has a constitutional right to sue on in the court which is asked to enforce the foreign judgment.

The recent decision of this Court in *Andrews* vs. *Andrews*, 188 U. S. 14, is also in point to show that "full faith and credit," does not always require the courts of one State to recognize much less enforce the judgments of another.

If this be not so—if the position of the learned counsel for appellant that the mere existence of the Illinois judgment requires the courts of New York to enforce it by a new action based upon it be correct—then it follows that all causes of action which may exist locally in any and every State may be enforced in every other State by the simple process of putting them into judgment in the State where they originally accrued (127 U. S. 290 *per* Gray, *J*).

Conceding that in Illinois the judgment now in question was "indisputable evidence of an invulnerable cause of action" (*Sanborn, J.*, in *Keyser* vs. *Lowell*, 117 Fed. Rep., 400, 406), and that the courts of New York must so regard it, if they look at it at all yet there is here a deeper question: Is the State of New York bound to look at it at all?

Before any question can arise under the "full faith and credit" clause, the judgment to which such faith and credit ought to be attributed must be regularly presented by the person claiming the benefit of the Constitution to the appropriate branch of the government of another State, to the end that such action as the occasion demands may be taken thereon. This presupposes that the person claiming the protection of the Constitution has a right under that Constitution to so present his judgment and demand such action. If he have not such right, the State to which he addresses himself and which simply ignores him, does not by so doing deny full faith and credit to the "judicial proceedings" of another State.

This leads to the next inquiry: Had the plaintiff a right secured to it by the Constitution and laws of the United States to demand action from the State of New York against The Davis Company.

SECOND.

The State of New York has the right to exclude from its courts foreign controversies between foreign corporations.

It may be conceded that the right to sue in the ordinary courts of justice of any State is one of the "privileges and immunities" secured by section 2, article 4 of the Constitution to the citizens of every other State.

> Blake *vs.* McClung, 172 U. S., 239, 256.
> Eingartner *vs.* The Illinois Steel Co., 94 Wis., 70.

A corporation, however, is not a citizen within this section.

It may be said that in limiting the jurisdiction of its courts over suits between foreign corporations the State of New York has denied the equal protection of its laws in violation of the Fourteenth Amendment. But the present plaintiff, being an Illinois corporation, is not "within the jurisdiction" of New York, and so is not entitled to the "equal protection" of its laws.

> Blake *vs.* McClung, 172 U. S., 239, 260, 261.

International comity no doubt accords to foreign corporations the privilege of suing in the local courts.

> Bank of Augusta *vs.* Earle, 13 Pet., 519, 591.

The State of New York has recognized this principle and in express terms opened its courts to foreign corporations, and placed them on the same footing as those of its own creation as regards claims against its own residents, or affecting property within its jurisdiction (Code of Civil Proc., sec., 1779; p. 2, ante). This would seem to be all that courtesy requires of it. It has also declared its public policy to be that its

courts shall not be vexed with the controversies of strangers originating without its limits.

Robinson *vs.* Oceanic Steam Nav. Co., 112 N. Y., 315.

Hoes *vs.* N. Y., N. H. & H. R. R., 173 N. Y., 435, 441.

So also the Courts of New York decline jurisdiction of transitory actions between non-residents based upon personal wrongs done without the State, even when the parties are both natural persons and, of course, citizens of another State.

Collard *vs.* Beach, 81 App. Div., 582.

Whether the limitations of section 1780 of the New York Code, so far as they affect a non-resident who is a "citizen" and, therefore, within the protection of article 4, section 2 of the Constitution, are valid is not now in question. The title of such citizen to the right to sue rests upon a foundation more solid than "comity."

There can be no question of the right of a State to absolutely exclude from its territory foreign corporations, excepting, perhaps, those engaged in inter-State commerce and those used as instrumentalities of federal government.

Waters-Peirce Oil Co. *vs.* Texas, 177 U. S., 28.

The right to sue is a franchise conferred upon a corporation by its charter and the law of its creation. How far the law of the State which created it and give it that right shall be recognized and enforced in another State is for that other State to determine.

Bank of Augusta *vs.* Earle, 13 Pet, 519, 589.

The recognition which one State accords as a courtesy to another by recognizing its laws, may of course be

withdrawn or withheld at pleasure. Accordingly the State of New York has by the statute now in question withheld that courtesy so far as it would be needed to enable one foreign corporation to assert against another a foreign cause of action.

THIRD.

The law in question—section 1780 of the New York Code—is one defining and limiting the jurisdiction of the court as regards subject-matter.

The nature of the jurisdiction of the Supreme Court of New York as regards foreign corporations has given rise to some difference of judicial opinion.

In *McCormick* vs. *Penn. R. R. Co.*, 49 N. Y., 303 (decided in 1872 and before the enactment of the law now in question), the plaintiff was a non-resident, the defendant a foreign corporation, and the cause of action arose without the State. It was held that the Court had jurisdiction of the subject-matter and that the general appearance of defendant gave jurisdiction of the person. The action was maintained although a new trial was ordered.

The Code of Civil Procedure, as regards section 1780, the law now in question, was enacted to take effect on September 1, 1880.

Robinson vs. *Oceanic Steam Nav. Co.*, 112 N. Y., 315, came before the Court of Appeals in 1889. Conditions were similar to those of the *McCormick* case, *i. e.*, plaintiff was a non-resident, defendant a foreign corporation, and the cause of action arose without the State. Defendant appeared generally and answered to the merits. It then moved to dismiss the action because the court had not jurisdiction of it. The motion

prevailed, the Court of Appeals holding that section 1780 of the Code of Civil Procedure had changed the law and in effect overruled the *McCormick* case. EARL, *J.*, says (p. 322):

> "The Supreme Court, being a court of general "jurisdiction, could, independently of any statute, "entertain actions against foreign corporations. "Such corporations could, by the common law, al- "ways be sued in this state by any plaintiff for "any cause of action provided jurisdiction could "be obtained of their persons. * * *
>
> "Thus the law remained until the Code of "Civil Procedure was enacted. (Section 1780 see "p. 2, *ante*). Under this section a resident of this "state, or a domestic corporation, can maintain an "action against a foreign corporation for any "cause of action, no matter where it arose. But an "action by a non-resident plaintiff against a for- "eign corporation can be maintained *only* in the "cases specified, and in no case for a cause of ac- "tion which arises outside of the state limits. "The jurisdiction of the courts is defined and lim- "ited, and absolutely confined to the cases speci- "fied."

In *Barker* vs. *Cunard Steamship Co.*, 91 Hun, 495 decided in 1895, VAN BRUNT, *P. J.*, with the *Robinson* case before him, says (p. 500):

> "In respect to foreign corporations the Supreme "Court has never been a court of general juris- "diction. It has no jurisdiction of actions against "foreign corporations, except such as is conferred "by statute."

These words of Judge Van Brunt were quoted with approval by the Appellate Division in the present case (Record, p. 6). Whether the jurisdiction of the Supreme Court of the State as regards foreign corporations be "general" or not, it is evident that the effect

of section 1780 was to limit that jurisdiction as regards the subject-matter rather than the person. In *Robinson* vs. *Oceanic Co.* jurisdiction of the person was complete by reason of the voluntary appearance of defendant, but jurisdiction of the subject-matter failed because of the statute. To quote again from the opinion of EARL, *J.* (112 N. Y., 324):

> "It is not sufficient that a non-resident plaintiff
> "should by any service of process or in any other
> "way obtain jurisdiction of a foreign corporation;
> "but before the action can be maintained in any
> "court of this state there must also be jurisdic-
> "tion of the subject-matter of the action."

See also Cromwell *vs.* Royal Canadian Ins. Co., 49 Md., 366, 383.

Courts being the creation of the state in which they exist, what power they shall possess is, of course, for that state to say.

Missouri *vs.* Lewis, 101 U. S., 22.

In the case cited BRADLEY, *J.*, says (p. 30):

> "It is the right of every State to establish such
> "courts as it sees fit, and to prescribe their
> "several jurisdictions, as to territorial extent,
> "subject-matter and amount, and the finality and
> "effect of their decisions, provided it does not
> "encroach upon the proper jurisdiction of the
> "United States, and does not abridge the privi-
> "leges and immunities of citizens of the United
> "States, and does not deprive any person of his
> "rights without due process of law, nor deny to
> "any person the equal protection of the laws, in-
> "cluding the equal right to resort to the appro-
> "priate courts for redress."

The legislation of New York now in question does not, of course, encroach upon the jurisdiction of the United States. It does not as regards this plaintiff,

abridge the privileges and immunities of citizens of the United States, for plaintiff is not such citizen. It has not been claimed to deprive plaintiff of property without due process of law. If it does deny the equal protection of the laws, it is not for that reason invalid because plaintiff, not being within the jurisdiction of New York, is not entitled to such protection.

Plaintiff in error relies in the case of *Christmas* vs. *Russell*, 5 Wall., 290, and the cases which have followed it—*Dodge* vs. *Coffin*, 15 Kan., 277, and *Keyser* vs. *Lowell*, 117 Fed. Rep., 400.

But the State statute overthrown in each of those cases was very different from that now in question. The first case involved a statute of Mississippi to the effect that no action could be maintained in the courts of that State against a resident upon a judgment rendered in another State upon a cause of action which by the laws of Mississippi, was barred at the time the action in the foreign State was begun. This statute was held repugnant to the full faith and credit clause. In *Dodge* vs. *Coffin*, a similar statute of Kansas was held void on the authority of *Christmas* vs. *Russell*, and in *Keyser* vs. *Lowell*, a like statute of Michigan was similarly treated by the Circuit Court of Appeals.

In each of the three cases cited the person attacking the statute was an individual citizen of the United States and so clothed with a constitutional right to sue upon any cause of action which he might have in the courts of any State where he could find his adversary and had a right to present his foreign judgment to the courts of that State and demand appropriate action thereon. That judgment being "indisputable evidence of an invulnerable cause of action" in the State where it was rendered could not be otherwise treated in the State to which it was presented, subject of course to investigation as to jurisdiction and matters happening since the rendition of the judgment. The cases cited are not authorities in support of plaintiff's claim

unless it be first established that a foreign corporation has a *right* to present even "an invulverable cause of action" to the New York court and demand action thereon.

FOURTH.

Several grounds of defense were asserted, one or more of which did not involve any federal question and was broad enough of itself to sustain the judgment.

Several grounds of demurrer were assigned.

First—That the court had not jurisdiction of the person of defendant.

* * * * * *

Third—That the complaint does not state facts sufficient to constitute a cause of action (p. 3).

New York practice sanctions such demurrer and requires that the issues of law raised by it should be disposed of by a formal and responsive decision (*Village of Palmyra* vs. *Wynkoop*, 53 Hun, 82). The trial court accordingly found that it had *not* jurisdiction of the *person* of defendant and that the complaint did *not* state facts sufficient to constitute a cause of action (p. 4).

The finding that the court had not jurisdiction of the person of defendant means that the Davis Company is not subject to the jurisdiction of the New York courts.; not that there was any defect in the service of process.

Ogdensburgh & L. C. R. R. Co., *vs.* Vermont & Canada R. R. Co., 16 Abb. Pr., [N. S.] 249; affirmed, 4 Hun, 712.

Belden *vs.* Wilkinson, 44 N. Y. App. Div., 419.

In *Ogdensburgh & L. C. R. R. Co., vs. Vermont & Canada R. R. Co.*, 16 Abb. Pr. [N. S.], 249, JAMES, *J.*, says (p. 255):

> "At common law the courts of this State had no "jurisdiction of the persons of foreign corpora- "tions, nor have our statutes provided any mode "whereby the personal appearance of foreign cor- "porations can be compelled. Such companies "may be proceeded against by attachment, and if "property is seized, judgment may be rendered "against such property without a personal appear- "ance by the defendant. It is only in cases of "voluntary appearance that our courts can have "jurisdiction of the persons of foreign corpora- "tions. (*McCormack vs. Penn. R. R. Co.*, 49 "*N. Y.*, 303.)

Since the above case was decided (1874) the Code of Civil Procedure has been enacted and the laws relating to corporations revised. Jurisdiction has perhaps been enlarged in one direction and limited in another.

Construction of the statutes fixing the jurisdiction of the State courts is for those courts alone.

New York law requires a foreign corporation before it may do business there, to appoint an agent within the State on whom process may be served (General Corporation Law, secs. 15 and 16). There is nothing in the record to show that the Davis Company ever did business in New York or had any agent or property therein. It would be in accordance with the decisions of this Court to hold that it was not subject to the jurisdiction of the courts of that State.

Goldey *vs.* Morning News, 156 U. S., 518.
St. Clair *vs.* Cox, 106 U. S., 350, 359.
Conley *vs.* Mathieson Alkali Works, 190 U. S., 406.

Whether defendant by its pleading or manner of defense appeared generally in the case so as to submit

itself to the jurisdiction was wholly a question of State law.

Jones *vs.* Jones, 108 N. Y., 415, 426.

The State court by deciding that there was no jurisdiction of the person, evidently held that defendant had not voluntarily submitted to its jurisdiction.

Whether the defendant is or is not amenable to the power of the New York court would seem to be a question of state law, and one which does not involve the Federal question sought to be raised. The State of New York may be ready and willing to do its utmost to render effectual the Illinois judgment; it may be eager and anxious to give it the "full faith and credit," which the Constitution requires, but if the party against whom that judgment was rendered, and against whom it must, if at all, be enforced is not within its limits, or subject to its power, what *can* it do? It would seem therefore that when it was decided that jurisdiction of the *person* was wanting, there was nothing left for the New York court to do but to dismiss the complaint—which it did (p. 5). The judgment was one of non-suit merely and will not embarrass the plaintiff elsewhere.

Genet *vs.* D. & H. C. Co., 170 N. Y., 278.

So also the finding that the complaint did not state facts sufficient to constitute a cause of action, was enough, standing alone, to sustain the judgment, and seems to be wholly aside from the Federal question.

The Court has many times decided that on writ of error to a state court, if it appear that there were grounds sufficient to sustain the judgment, not involving the Federal question sought to be raised, it will not review the judgment, but dismiss the writ.

Eustis *vs.* Bolles, 150 U. S., 361.
Harrison *vs.* Morton, 171 U. S., 38.
Pierce *vs.* Somerset Rwy., 171 U. S., 641.

It may be said that the rulings of the state court as to the jurisdiction of the person of defendant and

as to the sufficiency of the pleading, were erroneous. But they are questions of state law as to which the decision of the state court is final. This Court therefore is bound to assume them to have been correctly decided. It follows, therefore, that even if it be assumed that the state court was in error as to the Federal question, yet as the lack of jurisdiction over the person of defendant, is a ground broad enough to maintain the judgment this Court cannot review it.

Murdock *vs.* Memphis, 20 Wall, 590.
Jenkins *vs.* Loewenthal, 110 U. S., 222.
Rutland Rd. *vs.* C. V. R. R., 159 U. S., 650.
Bacon *vs.* Texas, 163 U. S., 207, 277.

FIFTH.

No right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed in the trial court.

It may be argued that some provision of the Constitution or laws of the United States secures to the plaintiff the right to sue in the New York courts, which right has been denied by the present judgment, thus bringing the case within the third class of cases of which this Court has jurisdiction under section 709 of the Revised Statutes. That section requires that such right, if relied on, must be specially set up or claimed. This means claimed at the proper time and in the proper way.

Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., 291.

"The proper time is in the trial court whenever that "is required by the state practice" (188 U. S., 308). New York practice does so require.

Dodge *vs.* Cornelius, 168 N. Y., 242.
Purdy *vs.* Erie R. R. Co., 162 N. Y., 42.
Erie R. R. Co. *vs.* Purdy, 185 U. S., 148.

"The proper way is by pleading, motion, exception "or other action, part, or being made part, of the rec- "ord showing that the claim was presented to the "court" (188 U. S., 308).

There is nothing whatever in the present record to show that any, or, if any, what constitutional right was claimed or asserted in the trial court. The pleadings are silent. No motion was made. No exception taken. No opinion rendered (p. 5).

SIXTH.

The judgment should be affirmed or the writ of error dismissed.

November , 1903.

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